

IN THE DISTRICT COURT OF SANPETE COUNTY, STATE OF UTAH

GUNNISON-FAYETTE CANAL COMPANY,
a Utah corporation,

Plaintiff,

vs.

GUNNISON-IRRIGATION COMPANY, a
Utah corporation, and if the fol-
lowing defendants have not been
merged therein, HIGHLAND CANAL
COMPANY, INC., and NEWFIELD CANAL
COMPANY, both Utah corporations,

Defendants.

ANSWER

Civil No. 5444

Daigland Ferguson
John S. Milson

The defendant, Gunnison Irrigation Company, a Utah corpor-
ation, answers the plaintiff's complaint filed herein as follows:

FIRST DEFENSE

The plaintiff's complaint fails to state a cause of action
against the defendant upon which relief can be granted.

SECOND DEFENSE

Specifically answering the allegations of the plaintiff's
complaint, the defendant admits, alleges and denies as follows:

1. Admits the allegations of paragraph 1.
2. Answering paragraph 2, the defendant alleges that
Gunnison Irrigation Company is a Utah corporation with its principal
place of business at Gunnison, Sanpete County, Utah. Highland Canal
Company, Inc. and Newfield Canal Company have heretofore been
merged into the defendant Gunnison Irrigation Company.

3. Admits the allegations of paragraph 3.
4. Answering paragraph 4 of the complaint the defendant
alleges that page 198 of the bound copy of the "Cox Decree" shows
a decreed right to Gunnison-Fayette Canal Company as follows:

"To the Gunnison Fayette Canal Company, a maximum
of 40 second feet of the water yielded by the Sanpitch
river above the intersection of Gunnison Fayette Canal
and Sanpitch River after all prior rights are satisfied
above the said intersection of Sanpitch River and the said

Gunnison Fayette Canal, to be used from March 1 to October 1 on lands under the Gunnison Fayette Canal system north of the Sanpitch River."

Except as admitted herein, the defendant denies each and every other allegation contained in paragraph 4 of the complaint.

5. Answering paragraph 5 of the complaint, the defendant alleges that page 167 of the bound copy of the "Cox Decree" shows a decreed "highwater" right to Highland Canal Company, Inc., which company has heretofore been merged with the defendant, Gunnison Irrigation Company:

"IRRIGATION:

"(c) 68 c.f.s. Priority: February 28, 1913, Application No. 1335, Certificate No. 293. Period of Use: April 1 to July 1. Points of Diversion: (1) Sanpitch River at a point S. 69 degrees 17 minutes W. 541 feet from the NE corner of the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ Sec. 32, T. 16 S., R. 2 E. into the Highland No. _____ Canal.

"(2) Twelve Mile Creek at a point S. 46 degrees 48 minutes W. 750 feet from the NE corner of the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ Sec. 32, T. 18 S., R. 2 E. into the Highland No. _____ Canal. It is provided, however, that all of the rights of the Highland Canal Company to the use of the water from Sanpitch River and its tributaries, Six Mile Creek and Twelve Mile Creek are subject to the right of the Gunnison-Fayette Canal Company to 25 c.f.s. out of 40 c.f.s. awarded to said Gunnison-Fayette Canal Company."

Except as admitted herein the defendant denies each and every other allegation contained in paragraph 5 of the complaint.

6. Denies the allegations of paragraph 6.
7. Denies the allegations of paragraph 7.
8. Denies the allegations of paragraph 8.
9. Denies the allegations of paragraph 9.
10. Denies the allegations of paragraph 10.
11. Denies each and every allegation contained in paragraph 11.

THIRD DEFENSE

As a third defense, the defendant alleges that the right of the Gunnison-Fayette Canal Company to 25 c.f.s. out of the 40

c.f.s. awarded to said Gunnison-Fayette Canal Company referred to page 167 of the "Cox Decree", paragraph (c) (2), and is prior only to the right of Highland Canal Company, Inc. (now Gunnison Irrigation Company), to 68 c.f.s. as shown in paragraph (c) of the "Cox Decree" at page 167 and the said 25 c.f.s. is not superior to any other right decreed to Highland Canal Company, Inc.

FOURTH DEFENSE

As a separate, affirmative fourth defense to the plaintiff's complaint, the defendant alleges that since the entry of the "Cox Decree" all of the parties to this action and their predecessors, have construed the right of the Gunnison-Fayette Canal Company to 25 c.f.s. out of the 40 c.f.s. awarded to said Gunnison-Fayette Canal Company as being simply a "highwater" priority superior only to the award to Highland Canal Company, Inc. of 68 c.f.s., all as shown in paragraph (c) of the "Cox Decree" at page 167 of the bound copy thereof.

FIFTH DEFENSE

As a further defense the defendant alleges that the "priority" of Gunnison-Fayette Canal Company to the 25 c.f.s. referred to in paragraph (c) (2) at page 167 of the "Cox Decree" is ambiguous and cannot be interpreted without examining the background circumstances and facts which led to the entry of the decree with respect to the foregoing; that interpreting the terms and provisions of the "Cox Decree" in regard to the foregoing and in the light of such background circumstances and facts, it is clearly demonstrated that the right of the Gunnison-Fayette Canal Company to the aforesaid 25 c.f.s. out of the 40 c.f.s. awarded to said Gunnison-Fayette Canal Company is prior only to the award to Highland

Canal Company, Inc. of 68 c.f.s., all as shown in paragraph (c) of the "Cox Decree" at page 167 of the bound copy thereof.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed; that it take nothing thereby; that the Court declare the aforesaid right of the Gunnison-Payette Canal Company to 25 c.f.s. out of the 40 c.f.s. awarded to said Gunnison-Payette Canal Company to be prior only to the aforesaid award to Highland Canal Company (now Gunnison Irrigation Company) of the 68 c.f.s., all as shown in paragraph (c) at page 167 of the bound edition of the "Cox Decree"; that the defendant be awarded costs incurred herein in defending this action and such other and further relief as to the Court seems just and equitable in the premises.

Dated this 3rd day of August, 1965.

McKAY AND BURTON

By

Macoy A. McMurray
Attorneys for Defendant
720 Newhouse Building
Salt Lake City, Utah

Mailed a copy of the foregoing Answer to Ken Chamberlain, Esq., Attorney for Plaintiff, 76 South Main Street, Richfield, Utah, this 3rd day of August, 1965.

McKAY AND BURTON
ATTORNEYS AND COUNSELORS AT LAW
NEWHOUSE BUILDING
SALT LAKE CITY 11, UTAH